No. 43044-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WENDY LOUISE TINSLEY and KENNETH TINSLEY,
Husband and wife and their marital community

Appellants,

vs.

TACOMA GOODWILL INDUSTRIES,
a Washington Corporation,

Respondent.

BRIEF OF APPELLANTS

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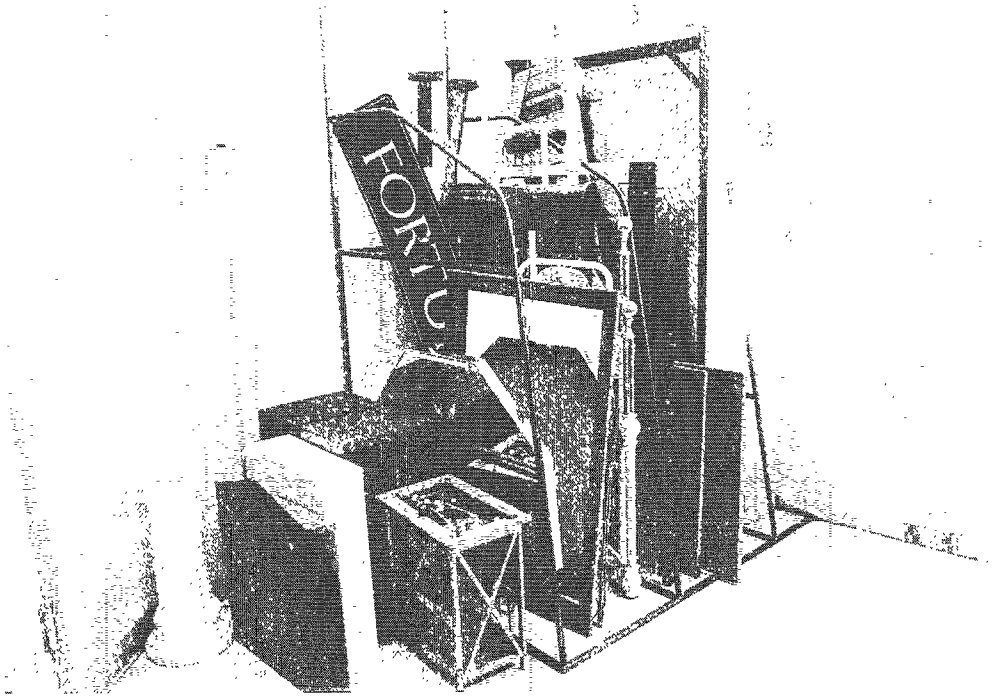
I. INTRODUCTION

Wendy Tinsley was critically injured by Defendants when she was struck on the back of the neck by a falling picture frame. Ms. Tinsley had surgery for the resulting herniated disk caused by the blow.

The defendant Goodwill had recently moved into a new location. Shelves were not up; however, the store was open for business. Picture frames were eventually to be placed in vertical racks as depicted below:



These racks were not in place when Wendy Tinsley was injured. Instead, several pictures had been placed on top of a mattress which was near the employee break room. Wendy was bent over in front of the

mattress looking at a toy rocker when the large picture frame fell, striking her in the neck and injuring her.

The trial court erred in granting Defendant's Motion for Summary Judgment on liability when there was a genuine issue of material fact as to whether the store was on notice and/or the operating methods created a foreseeable dangerous condition.

II. ASSIGNMENT OF ERROR

A. Appellants/Plaintiff assign error to the Order on Summary Judgment granting Defendant's Summary Judgment Motion and to the Order denying Plaintiff's Motion for Reconsideration entered on January 27, 2012.

B. Issues Pertaining to Assignment of Error.

1. Did the trial court err in granting summary judgment on liability when there is a material question of fact whether Defendant's operating methods at the time of injury created a foreseeable dangerous condition?

2. Did the trial court err in granting summary judgment on liability when there is a material question of fact whether Defendant knew or should have known of the potentially dangerous condition?

III. STATEMENT OF CASE - FACTS

The Defendant moved the location of its Longview Goodwill store to a new location starting June 28, 2007 (CP 99). When Wendy Tinsley, Plaintiff, visited the store with her cousin, Carlena De La Grange, it was the first time either of the ladies had been to the Goodwill store in its new location (CP 110).

Ms. De La Grange described the location where the injury occurred. She stated in her deposition that a double-sized mattress had been leaned against the wall and the picture frame was stacked on top of the edge of the mattress also leaning against the wall (CP 108-109).

Ms. De La Grange verbally described in her declaration in opposition to Defendant's summary judgment motion that the Defendants had just recently moved into their new location, an old bingo hall. Items for sale where stacked everywhere. Shelving was not yet up. The location of the accident was by the break room which also led to the men's and women's bathrooms (CP 70-73). A floor plan depicting the Goodwill store was attached to Ms. De La Grange's declaration. The floor plan was not accurate when the accident occurred in 2007 (CP 70). This floor plan had been attached to Ms. De La Grange's discovery deposition which was taken December 14, 2011. The floor plan as it existed in August 2007 did

not have the shelving or the racks for picture frames (CP 72, attached as Appendix 1 to brief).

The Goodwill employees had to walk by the mattress and pictures to use the break room, to go to the restrooms, or to go into the back room or production area (CP 70). They walked by it "all day long" (CP 64).

Neither Ms. Tinsley, the Plaintiff, or her cousin, Ms. De La Grange touched or moved the picture that fell and struck Ms. Tinsley on the back of the neck (CP 67).

IV. ARGUMENT

A. Standard of Review.

This case comes before this Court on appeal from the trial court's granting of Defendant's Motion for Summary Judgment. Thus, the appellate court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County* 118 Wn.2d 852, 827 P.2d 1000 (1992); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985); *Wilson v. Steinbach* 98 Wn.2d 434, 656 P.2d 1030 (1982). All facts must be viewed most favorably to the party resisting the motion. Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Sheriffs' Association v. Chelan County*, 109 Wn.2d 282, 745 P.2d 1 (1987).

Further, in a ruling on a motion, the nonmoving party's evidence, together with all reasonable inferences that may be drawn from it, must be accepted as true. *Holmes v. Wallace*, 84 Wn. App. 156, 926 P.2d 339 (1996). The issues of negligence and proximate cause are generally not susceptible to summary judgment. *Atherton Condo Assn. v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

B. Argument regarding assignments of error.

1. The trial court erred in granting summary judgment when the material question as to the self-service store's operating methods at the time of injury created a foreseeably dangerous condition.

The Defendant Goodwill is a self-service store. In a self-service situation an exception applies to general rule that Plaintiff must show the specific unsafe condition existed for sufficient time to afford the Defendant an opportunity to discover it and remove the danger. (See WPI 120.06). This exception is commonly known as the Pimentel exception. *Pimentel v. Roundup Co.*, 100 Wn.2d 34, 666, P. 2d 888 (1983). Actual or constructive notice is not required when the methods of operation are such that the existence of an unsafe condition is reasonably foreseeable.

The standard of care for the operation of this Goodwill store is to place many items for purchase on shelving and specifically to have pictures and picture frames placed in racks (CP 64-65).

The shelves were not up when Plaintiff and her cousin Ms. De La Grange visited the store (CP 72). The pictures and frames were not in racks. (CP 69-72). The picture frame that struck Wendy Tinsley was not fastened or secured in any manner. It was simply leaning against the wall on top of a mattress. It is important that not just one picture was on the mattress but several had been placed there (CP 70).

Further, a conflict exists between Defendant's two store employees who filed declarations in support of Defendant's Motion for Summary Judgment. Ms. Deanna Bixby declared that is was Goodwill's "practice to place large pictures on the floor, sandwiched between other items" (CP 62. No rack was mentioned. Ms. Pam Yanez testified that large pictures such as the one that struck Wendy Tinsley were placed in vertical racks on the floor. Ms. Yanez even took a photograph on February 14, 2011 representing how large pictures were to be placed (CP 64-65).

In *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn.App 854, 28 P.3d 799 (2001) the Plaintiff had slipped and fallen on a piece of lettuce a few steps inside the check-out aisle of the store. It was held that in areas where customers unload their own groceries it was reasonably

foreseeable that debris would fall into the aisle. *Zupan's* required all employees to pick up debris when they saw it. Thus, a material question of fact was raised whether *Zupan's* mode of operation exercised reasonable care to prevent injuries caused by customers who dropped items.

In *Pimentel*, *supra*, a woman was looking at a magazine when a can of paint fell on her foot. The Court of Appeals ruled that proof of actual or constructive knowledge by the store was not necessary when there are operating procedures such that it is reasonably foreseeable that an unreasonably dangerous condition can exist. In *Pimentel*, the only regular inspection occurred in the morning before the store opened.

Goodwill is a self-service store. It is extremely unlikely that a random customer placed or stacked multiple pictures on top of the mattress. What is more probable is that an employee of Goodwill put the pictures on top of the mattress until the shelving and racks for display of merchandise were in place. Regardless, the operating methods of the Defendant at the time of this injury did not meet their own standard of care regarding the placement of pictures. Thus, the mode of operation of the business at the time Wendy Tinsley was injured was such that the existence of unsafe conditions on the premises was reasonably foreseeable.

2. There was a material question of fact whether Defendant knew or should have known of the potentially dangerous condition.

The trial court in its oral opinion granting Defendants summary judgment motion concluded that there was nothing in the record to a) show notice to the store; or b) that the operating methods of Goodwill created a continuous and foreseeable dangerous condition (CP 152).

The location where this accident occurred is in a high traffic area. Ms. Yanez declared that, "the location where Ms. Tinsley said the incident occurred was the only way to the production area. As a result, all of us who worked in the store walked by it all day long" (CP 64).

The floor plan attached to Ms. De La Grange's declaration shows not only the entry to the production area nearby; but, the break room and restroom were also there as well increasing the frequency of the foot traffic passing by the potentially dangerous condition (CP 72).

Neither Goodwill employee Pam Yanez nor Deanna Bixby stated that a regular inspection schedule existed; only that employees were on alert for dangerous conditions. This fact pattern is very similar to that in *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn.App 854, 28 P.3d 799 (2001). *O'Donnell's* facts also apply to the lack of need to prove actual notice. *Zupan's* required all employees to pick up debris when they saw

it. In addition, *Zupan's* had a janitor that swept the area on a daily basis. The Court of Appeals held even though there was a policy requiring hourly checks the employees followed no set plan or pattern for checking for debris in the checkout area. Thus, a material question of fact was raised whether *Zupan* exercised reasonable care to prevent injuries caused by customers who dropped items.

The Pimentel exception "merely eliminates the need for establishing notice" where it applies. Therefore, the plaintiff must also prove "that defendant failed to take reasonable care to prevent the injury." *Pimentel*, 100 Wn.2d at 49. In exercising reasonable care, a store proprietor must inspect for dangerous conditions and provide such repair, safeguards, or warning as may be reasonably necessary to protect its customers under the circumstances. *O'Donnell*, 107 Wn. App. at 860. This standard of care applies regardless of the mode of operation; however, the type of precautions that are reasonable depends on the nature and the circumstances surrounding the business conduct, including the mode of operation. *O'Donnell*, 107 Wn. App. at 860. "The self-service mode of operation might require a proprietor to implement protections that are not necessary under other circumstances, such as installing special types of flooring or implementing housekeeping or inspection procedures that reduce the risk of harm and enable the proprietor to discover and remove hazardous conditions customers create." *O'Donnell*, 107 Wn. App. at 860.

"The reasonableness of a proprietor's methods of protection is a question of fact." *O'Donnell*, 107 Wn. App. at 860.

Here the trial court relied "with particular interest" on *Las v. Yellow Front Stores*, 66 Wn.App 196, 831 P.2d 744 (1992) (CP 149). The following table compares the facts of the *Las* case with facts of the Wendy Tinsley case:

Comparisons of *Las* with Tinsley

LAS	GOODWILL
1. Pans were on lower display shelves; - none overhung (or appeared hazardous).	1. Store recently opened - Mattresses were leaned against the wall and not in racks - Pictures were placed on top of mattresses (clearly a hazard) and not stacked upright on floor in vertical racks
2. Store shelving and displays were set up.	2. Store shelving, displays and racks were not set up. Items for sale were on floor or leaned up against wall.
3. Pans were stacked on appropriate shelving.	3. Mattresses and pictures were to be placed in vertical racks. (Declaration of Pam Yanez, Goodwill Manager). The mattress and pictures were not in racks. (See photo below from Yanez Declaration, resized for illustrative purposes)
4. Ms. Las removed one pan and the others fell.	4. Neither Ms. Tinsley nor Ms. De La Grange touched or moved the mattress or pictures.
5. No witnesses.	5. Ms. Carlena De La Grange witnessed incident.
6. Pans not noticeably hazardous to store employees.	6. Pictures on mattress noticeably hazardous to store employees.

As argued above when Ms. Tinsley was injured, the mode of operation of the Goodwill store was that no schedule of inspection was identified and the recommended storage of large pictures was not occurring because there were no shelves or racks yet in place. Customers were required to and could handle, pick up, and move items around; thus, creating a potential hazard.

V. CONCLUSION

Goodwill is charged with knowledge of reasonably foreseeable risks that are inherent in a self-service mode of operation. All inferences from the facts are to be construed in favor of Ms. Tinsley. In this case, multiple pictures were stacked on top of a mattress which was simply leaned against a wall. None of the pictures were in a rack or "sandwiched between other items" (CP 62).

A material issue of fact remains whether Goodwill took adequate precautions to prevent injuries to customers in light of the foreseeable hazard. Summary judgment was inappropriate.

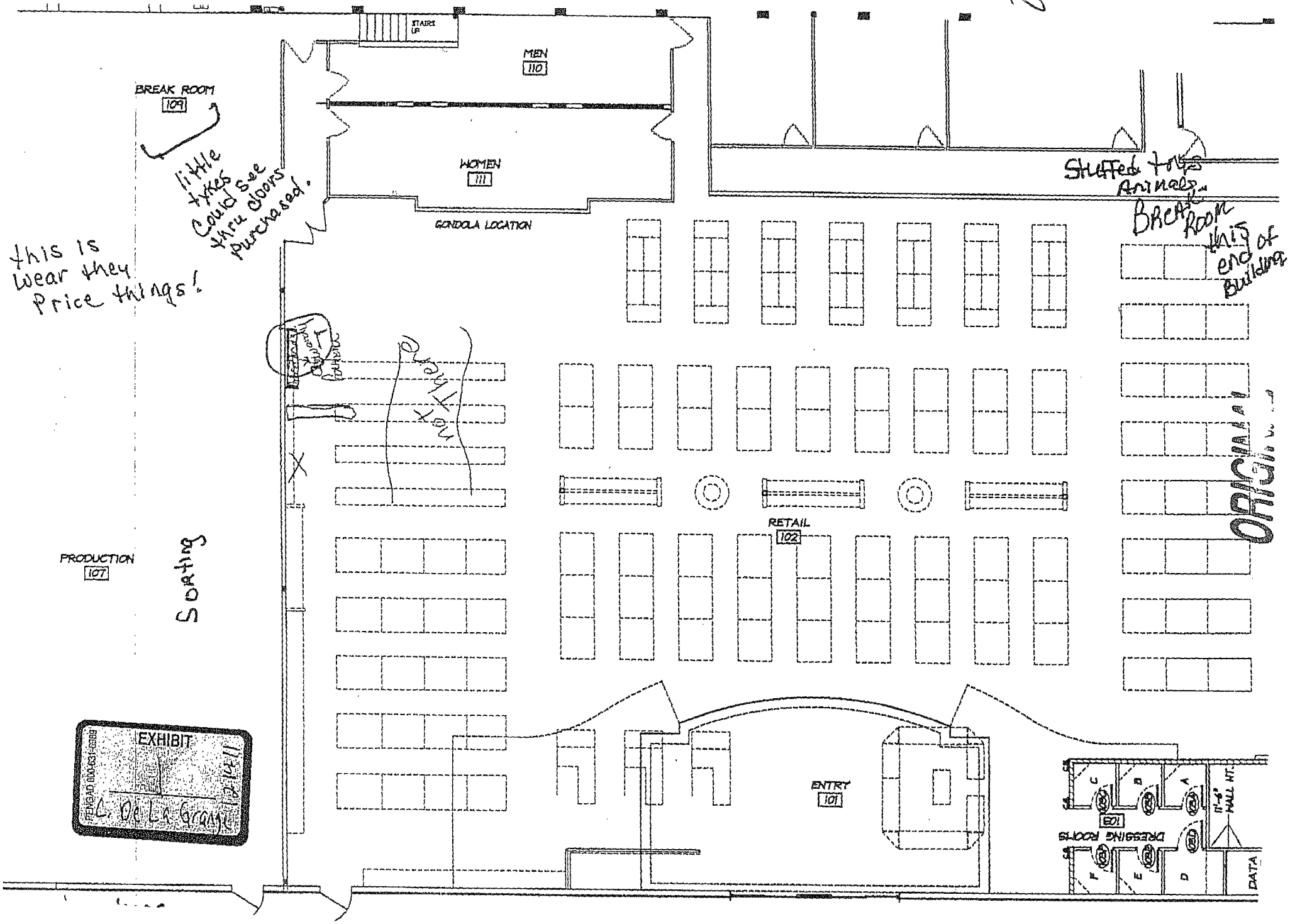
The trial court's decision granting Defendant's Motion for Summary Judgment should be reversed and this case remanded for trial.

Dated this 14th day of May, 2012.

Respectfully submitted,

JACK W. HANEMANN, P.S.

Jack W. Hanemann, WSBA #6609
Attorney for Plaintiffs


STAIRS UP
MEN
110
BREAK ROOM
109
WOMEN
111
GONDOLA LOCATION
RETAIL
102
PRODUCTION
107
ENTRY
101
DRESSING ROOMS
DATA
EXHIBIT
Little tykes could see thru doors purchased.
this is wear they Price things!
Stuffed toys Animals
Break Room this of end Building
ORIGINAL

COURT OF APPEALS

STATE OF WASHINGTON DIVISION II

WENDY LOUISE TINSLEY, a married individual, and WENDY LOUISE TINSLEY and KENNETH TINSLEY, a married couple, Appellant, vs. TACOMA GOODWILL INDUSTRIES, a Washington Corporation, Respondent.	Court of Appeals Case No. 43044-4-II **DECLARATION OF SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Appellant's Brief and this Declaration of Service to all parties on record by depositing prepaid envelopes in the U.S. Mail as follows:

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Amy Galloway
Legal Assistant

HANEMANN, BATEMAN, AND JONES

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